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84500-0

NO. ~~83949-2~~

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAVID MOELLER, individually and as the representative of all persons similarly situated,

Plaintiff/Respondent,

v.

FARMERS INSURANCE EXCHANGE, and FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Petitioners.

ANSWER TO PETITION FOR REVIEW

WIGGINS & MASTERS, P.L.L.C.

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INTRODUCTION

Notwithstanding the extraordinary delay this case suffered in the Court of Appeals, it presents a very simple, straightforward insurance-contract claim, which the appellate court correctly analyzed under well established Washington law. Farmers' arguments ignore standard Washington insurance-contract principles; most importantly, that insurance contracts are construed broadly to provide coverage, and any limitations on that coverage are narrowly construed against the insurance company. Farmers wants our courts to interpret its ambiguous limitation-of-liability clause broadly in its favor, an impossible analysis under a massive amount of controlling Washington precedent.

The class certification is also correct, since the case easily meets the necessary criteria, and no other economically reasonable means exists to pursue the many thousands of relatively small claims without overwhelming our courts. The trial court did not abuse its discretion in certifying this class.

As the accompanying motion suggests, this Court should expedite its denial of this Petition as much as reasonably possible due to the unconscionable delay the Class has already suffered. No review criteria are satisfied here.

STATEMENT OF FACTS & OPINION ANALYSIS

The Court of Appeals correctly sets forth the very simple facts of this case: an accidental automobile collision; denial of an insurance claim for diminished value; a class-action suit; class certification; and summary judgment. Opinion 1-3. While Farmers' Petition attempts to gloss the facts in the light most favorable to it, that is improper on summary judgment review. *Id.* at 4-5.

The Opinion cites the following key facts:

- "Farmers did not compensate Moeller for [his] vehicle's diminished value, that is [the] damage that cannot be repaired such as weakened metal." *Id.* at 2.
- The "crux" of "Moeller's complaint was Farmers' failure to restore his vehicle to its 'pre-loss condition through payment of the difference in the value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned.'" *Id.* (citing CP 435).
- "After four days of oral argument, the trial court certified a class under CR 23(b)(3). We denied Farmers' motion for discretionary review." *Id.*

A. The appellate court interpreted the insurance contract most favorably to the insureds, reversed, and remanded.

The Opinion's Analysis begins where it should, with the policy language. Opinion 3. Farmers promised to pay Moeller "for **loss** to **your Insured car** caused by **collision** less any applicable deductibles." *Id.*; CP 19. "**Loss** means direct and accidental loss of or damage to **your Insured car**, including its equipment." *Id.*

Farmers limited its liability for loss, however, so that it "shall not exceed: . . . The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." Opinion 3; CP 20.

The Opinion then carefully and thoroughly sets forth the Standards of Review (*de novo* for summary judgment and contract interpretation) and the relevant contract interpretation principles. Opinion 4-5. Among the latter, the following three axioms are key:

- The policy is interpreted as an average insured would read it, giving undefined terms their plain, ordinary, and popular meaning, often using dictionary definitions. *Id.* at 5.
- Unambiguous language needs no interpretation, but ambiguities are construed against the insurer. *Id.*
- Inclusionary clauses are construed liberally to provide coverage, while limiting clauses are narrowly construed against the insurer. *Id.*

Following the very well established process of Washington insurance-contract interpretation, the appellate court next inquires whether the Class's claim is covered. *Id.* at 6-8. It begins by pointing out that the claim is for diminished value: the "remaining, irreparable physical damage, such as, for example, weakened metal which cannot be repaired." *Id.* at 6. The Class is not seeking

so-called "stigma" damages, the "intangible taint due to its having been involved in an accident." *Id.*

The appellate court holds that Famers' policy unambiguously covers diminished-value damage. Opinion 6-8. Under The Collision Coverage Part, Farmers "will pay for **loss** to **your Insured car** caused by **collision** less any applicable deductibles."[1] CP 19. "**Loss**" includes "direct and accidental . . . damage to **your Insured car**." *Id.* While "direct," "accidental," and "damage," are undefined terms, "direct" commonly means "without any intervening agency or step." Opinion at 6-7. Under the policy, "accident" means "a sudden event . . . resulting in . . . **property damage,**" and "**property damage**" is "physical injury to . . . tangible property." *Id.*; CP 12. "Damage" is commonly defined as "injury or harm to . . . property." Opinion at 7. Thus, "because it is indisputable that there was physical injury to [his] vehicle[], any and all damages flowing therefrom, and not expressly excluded by the policy, are clearly covered." *Id.* at 8 (quoting Appellant's Br. at 22).

Again following a great deal of Washington precedent on insurance-contract analysis, the appellate court then asked whether

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[1] It is undisputed here that Moeller's car was insured and that it was damaged in a "collision," and the class definition so requires. CP 1582.

Farmers had otherwise excluded coverage. Opinion 8-10. The court correctly noted that Farmers has never argued that any exclusionary clause applies here. *Id.* at 8 n.9. Rather, Farmers asserts that its limits of liability clause eliminates the coverage for diminished-value damages. *Id.*

As relevant here, that clause provides:

> Our limits of liability for **loss** shall not exceed:
>
> 1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation.

CP 20. Again following standard Washington insurance-contract analysis, the appellate court next examined whether this clause is ambiguous by looking at the parties' proffered interpretations. Opinion 9-10. The Class maintained that "to repair . . . with . . . like kind or quality" means to restore appearance, function, and value. *Id.* at 9. The court noted that the undefined term "quality" means "degree of excellence." *Id.* Excellence means "a valuable quality." WEBSTER'S THIRD NEW INT'L DICTIONARY 791 (1993). Thus, Farmers agreed to repair Moeller's car to the same degree of excellence – the same value – as before the collision. Opinion 9. The court found this a reasonable interpretation, consistent with its duty to construe coverage limitations most favorably to the insured. *Id.*

Seeking the interpretation most favorable to itself, however, Farmers argued that – like a broken plate glued back together – a car could be "repaired" to look and function the same, which "good condition" – or "essential nature" – is all it promised. Opinion 10. But the policy nowhere uses the phrases "good condition" and "essential nature," much less explicitly telling the insured that Farmers need not return the car in its pre-collision "quality." *Id.* Nor is the car repaired to the same "essential nature" when, as here, weakened metal impairs its quality. *Id.* Properly interpreting this ambiguous coverage limitation in the light most favorable to the insured, the appellate court rejected Farmers' over-broad interpretation, reversed, and remanded for trial. *Id.*

B. The appellate court reversed and remanded on the Class's CPA claim.

The appellate court correctly notes that the trial court dismissed the Class's CPA claim based on its erroneous interpretation of the insurance contract. Opinion 10. Farmers tacitly concedes that this holding does not merit review by this court, failing to raise the issue in its Petition. Remand will thus be required on the CPA claim, regardless of the outcome of any further issues discussed below.

C. The appellate court found no abuse of discretion in the trial court's rigorous and thorough class-certification rulings, rejecting Farmers' cross appeal.

Finally, the appellate court rejected Farmers' cross appeal regarding the trial court's class certification rulings. Opinion 10-15. The trial court gave thorough and rigorous attention to Farmers' arguments: as noted earlier in the Opinion, it held a four-day hearing on class certification. *Id.* at 2. It entered a lengthy Class Certification Order (CP 1569-83, copy attached), which notes that following extensive discovery overseen by a Special Master and the trial judge, it considered a great many pleadings and depositions, and deemed itself thoroughly advised in the premises. CP 1572-73. The appellate court thus found no abuse of discretion; *i.e.*, the decision has "tenable, reasonable support," and "the trial court considered the CR 23 criteria." Opinion 11.

The appellate court notes that the Class must satisfy the criteria of CR 23(a), and one of the three requirements in CR 23(b). *Id.* at 10-11. Farmers does not challenge the trial court's rulings that the Class satisfies the CR 23(a) criteria, numerosity, commonality, typicality, and adequacy of representation. *Id.* at 11. The issue is thus whether the trial court abused its discretion in finding CR 23(b)(3) satisfied; *i.e.*, whether common questions of

fact or law predominate over individual questions and whether a class action is superior to other fair and efficient processes. *Id.*

Following a great deal of Washington precedent,[2] the trial and appellate courts recognized several common issues of law and fact, including whether these policies cover diminished value; whether the Class suffered diminished value not caused by inferior repairs; whether the Class's vehicles could be returned to pre-accident condition; and whether Farmers systematically avoided paying diminished-value claims. Opinion 13. As to predominance, the trial court expressly considered CR 23(B)(3)(A-D), with only (D) – trial management – heavily disputed. *Id.* It concluded that "the only conceivable method to adjudicate or resolve this case is through a class action, as the de minimus size of individual claims would leave policyholders without practical recourse . . . ." *Id.* at 14; *see also* CP 1569-83 (attached). Simply put, "[g]iven the common, overriding issues of law and fact, judicial economy warranted certification." *Id.* at 15. The trial court correctly rejected Farmers' various claims to the contrary. *Id.* at 14-15 & nn.13-15.

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[2] Citing, *inter alia*, ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 318, 54 P.3d 665 (2002), and ***Sitton v. State Farm Mut. Auto. Ins. Co.***, 116 Wn. App. 245, 250, 63 P.3d 198 (2003). Opinion 12-13.

ARGUMENT WHY REVIEW IS UNJUSTIFIED

As the accompanying motion explains, this appeal has been delayed much too long already. The Court should hesitate to delay a trial any longer. The Court should quickly deny review.

This is all the more true in that Farmers fails to even cite, much less argue and meet, any of this Court's RAP 13.4(b) criteria. Its two issue statements parrot the language of RAP 13.4(b)(4) – the substantial public interest element – but the Petition largely rehashes merits arguments that the appellate court rejected (coverage issue) and that both the trial and appellate courts rejected (class certification). Since the appellate court's Opinion is unremarkably correct, there is no need for this Court to accept review simply to reiterate those holdings.

A. Farmers' so-called "majority rule" concerns inapposite contract language and/or contract analysis, and raises no issue of substantial public interest.

As set forth in the above opinion analysis, the appellate court's reasoning on coverage and Farmers' limitation-of-liability clause follows a great deal of Washington precedent and is unremarkably correct. Farmers tacitly concedes that the appellate Opinion is wholly consistent with Washington law, failing to raise a single conflict. This Court should deny review.

Having no Washington law to rely upon, Farmers continues with its disingenuous and grossly overbroad assertions that the "majority view" is contrary to the appellate court's Opinion. As the Court of Appeals notes, the "question presented is not whether *any* insured may recover for diminished value in Washington," but rather "whether Moeller's insurance policy covers diminished value." Opinion 6 n.4. Under this policy language, "[m]ost courts have determined that diminished value is a covered loss under a 'direct and accidental loss' coverage clause." *Id.* at 8 n.8.[3]

Moreover, in the primary cases Farmers cites here, while the majority of courts have acknowledged that diminished value is covered, these "courts found no ambiguity [in the "limits of liability"

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[3] These cases include, *e.g.*, ***MFA Ins. Co. v. Citizens Nat'l Bank***, 545 S.W.2d 70 (Ark. 1977); ***Hyden v. Farmers Ins. Exch.***, 20 P.3d 1222 (Colo.Ct.App.2000); ***State Farm Mut. Auto. Ins. Co. v. Mabry***, 274 Ga. 498, 556 S.E.2d 114 (2001); ***Venable v. Imp. Volkswagen, Inc.***, 214 Kan. 43, 519 P.2d 667 (1974); ***Ciresi v. Globe & Rutgers Fire Ins. Co.***, 187 Minn. 145, 244 N.W. 688 (1932); ***Potomac Ins. Co. v. Wilkinson***, 213 Miss. 520, 57 So. 2d 158 (1952); ***Eby v. Foremost Ins. Co.***, 374 P.2d 857 (Mont. 1962); ***Edwards v. Md. Motorcar Ins. Co.***, 204 A.D. 174, 197 N.Y.S. 460 (N.Y. App. Div.1922); ***Pierce v. Am. Fid. Fire Ins. Co.***, 240 N.C. 567, 83 S.E.2d 493 (1954); ***Gonzales v. Farmers Ins. Co.***, 345 Or. 382, 196 P.3d 1 (2008); ***Nat'l Farmers Union Prop. & Cas. Co. v. Watson***, 298 P.2d 762 (Okla. 1956); ***Dunmire Motor Co. v. Or. Mut. Fire Ins. Co.***, 166 Or. 690, 114 P.2d 1005 (1941); ***Campbell v. Calvert Fire Ins. Co.***, 234 S.C. 583, 109 S.E.2d 572 (1959); ***Senter v. Tenn. Farmers Mut. Ins. Co.***, 702 S.W.2d 175 (Tenn. Ct. App.1985); *See generally* L.S. Tellier, Annotation, *Measure of Recovery by Insured Under Automobile Collision Insurance Policy*, 43 A.L.R.2d 327 (1995).

clause], thus distinguishing them from the situation here." *Id.* at 8-9 n.10; *see, e.g.*, ***Sims v. Allstate Ins. Co.***, 851 N.E.2d 701 (Ill.App. 5 Dist. 2006) ("We find no ambiguity" in "limit of liability" clause); ***Allgood v. Meridian Sec. Ins. Co.***, 836 N.E.2d 243, 247 (Ind. 2005) (same); ***Driscoll v. State Farm Mut. Auto. Ins. Co.***, 227 F. Supp. 2d 696, 707 (E.D. Mich. 2002) (same); ***Am. Manufacturers Mut. Ins. Co. v. Schaefer***, 124 S.W.3d 154, 158 (Tex. 2003) (same). These decisions are simply inconsistent with Washington law.

That is, under Washington law ambiguous clauses purporting to limit coverage are narrowly construed against the insurer. *See, e.g.*, ***Eurick v. Pemco Ins. Co.***, 108 Wn.2d 338, 340, 738 P.2d 251 (1987) (citing ***Farmers Ins. Co. v. Clure***, 41 Wn. App. 212, 215, 702 P.2d 1247 (1985)). No matter how many broad interpretations Farmers proffers, our courts will apply a narrow but reasonable interpretation favoring coverage. Farmers' arguments ignore this very basic principle of Washington law. Under this ambiguous contract language, the result is simply inevitable. This Court should deny discretionary review.

B. The trial court did not abuse its discretion in certifying this Class.

As explained in the Opinion Analysis above, the trial court was extremely rigorous and thorough in analyzing whether to certify this class. *See* CP 1569-83 (Class Certification Order, attached). Following extensive discovery overseen by a Special Master and the trial Judge, the court read many depositions, read dispositive and other motions, held a four-day hearing, considered all of the relevant factors, and carefully considered Farmers' arguments. *See e.g.*, CP 1572-73 (attached). The Court of Appeals properly found no abuse of discretion. Again, this Court should deny discretionary review.

The trial court entered lengthy findings regarding the CR 23(a) requirements of numerosity (perhaps 200,000 class members); commonality (common legal analysis involving interpretation of identical contract language, common facts including whether "each class member's vehicle suffered a reduction in value" and whether Farmers systematically processed claims to avoid diminished-value damages); typicality (Moeller's accident meets class-cert. criteria); and adequacy (counsel are "knowledgeable and experienced in this type of litigation"). CP

1573-76. Farmers fails to challenge any of these findings, many of which directly contradict many of Farmers' claims in its Petition.

Farmers instead reiterates two claims, the first rejected by the trial and appellate courts, the second never raised before.[4] First, Farmers repeats over and over its claim that class counsel "admitted" that some members of the class suffered no damages (*i.e.*, for the perhaps non-existent subclass of plaintiffs whose vehicles were damaged twice in exactly the same way, Farmers claims there would be no diminished value). Second, Farmers attacks the plaintiffs' "trial plan," even though its issue statements (in the appellate court and in this Court) do not mention the trial plan at all. Neither claim has merit.

As with so much in Farmers' Petition, it badly overstates the record in repeatedly claiming that the Class "admitted that some members of the proposed class would not have sustained any diminished value injury . . . because . . . their cars had previously been 'wrecked and repaired.'" In reality, at the end of many, many

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[4] Farmers' issue "2" in this Court claims a conflict with ***Sitton***, but Farmers nowhere briefs the alleged conflict, the appellate court followed ***Sitton***, and there is no conflict because ***Sitton*** affirmed class certification, as discussed *infra*. Farmers also sprinkles the words "due process" and "constitutional" about its Petition, but nowhere briefs these "issues."

pages in which class counsel explains in great detail the multiple regression analysis[5] proposed by the Class's expert to control for variables in the valuation analysis, counsel gave the following hypothetical example:

> Then what you do is any factors that represent a defense, **something that would reduce the classwide damage**, you discount for.
>
> And we spent a lot of time in [Farmers' expert] Dr. Welch's deposition talking about one factor . . . dealing with the . . . claim that . . . a vehicle had been wrecked and repaired and then it gets into a second accident. Well, what do you do with that second accident?
>
> Well, Dr. Welch said and everybody said and everybody seems to address that if you get damaged in the same area of the vehicle, you **probably** don't get any more diminished value. I mean, it just doesn't make any sense.
>
> So what you do there is you look at actual data from the defendants, you look at the accident histories of the vehicle, and you ask yourself, what is the statistical likelihood that that defense, i.e., the vehicle was repaired in the same place, has occurred? And **it may turn out** that 5 percent of vehicles in the class, by doing a statistical sampling, would have had a wreck that would replicate an earlier wreck, in which case they would get no DV. So then **you lop 5 percent off your damage estimate**.

6/27/02 RP 77 (emphases added).

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[5] Multiple regression analysis is a statistical technique used to measure the extent to which a series of independent variables affects one dependent variable. The analysis computes a "coefficient" for each independent variable, which measures the degree to which that variable influences the dependent variable – the higher the coefficient, the more significant the variable.

In the first place, this is a hypothetical example of how a multiple regression analysis accounts for variables that affect damages proffered as defenses; it is not a concession that the facts stated in the hypothetical are true. In the second place, taking the facts in the light most favorable to the non-movant class, the chances that a vehicle is damaged in exactly the same way twice may be so remote as to be statistically nonexistent, notwithstanding counsel's from-the-hip hypothetical. In the third place, counsel said you lop off five percent of your **damage** estimate – not off of your class, much less off of your liability determination.

That is, it may prove out that it is simply impossible to calculate the small diminished value from the second collision – it may be *de minimus* – so you simply reduce the damages by some percentage. This does not remotely suggest that any particular class member did not suffer any diminished value. On the contrary, the class definition requires that the vehicle repair estimates totaled at least $1,000 and that the vehicle suffered structural (frame) damage, deformed sheet metal, and/or required body or paint work. CP 1582. Such a vehicle unquestionably suffers diminished value damages, although they may be statistically *de minimus*.

Farmers' other issue seems to be the so-called "trial plan." Again, Farmers has never assigned error to the preliminary trial plan, and of course, preliminary trial plans change, and all of this is just trial management, on which the very thorough and rigorous trial Judge did not abuse her discretion. On the contrary, the court reasoned quite clearly:

> Plaintiffs have also presented the Court with a preliminary plan of how to proceed to gather the data on vehicles and how to manage this litigation as a class action. Their plan evidences a keen understanding of the steps necessary to process claims, identify class members, analyze the data on the existence or amount of diminished value, make adjustments to the classwide damages for any defenses raised (and substantiated by Defendants), and then provide for notification and allocation of any damages awarded to the class after trial. Plaintiff's counsel have exhibited an understanding of the sources of data, cross checks on that data, supplemental sources of data, and use of computers to index and manipulate that data. This will expedite the retrieval, sorting, and analysis of pertinent data for both the Plaintiffs and Defendants.

CP 1579-80. The trial court thus flatly rejected Farmers' various claims that the preliminary trial plan in any way deprived Farmers of its right to bring forth its various defenses.

Indeed, that simply is not at issue in class certification proceedings. The only disputed issue here is trial management, and the trial court properly determined that notwithstanding Farmers' "the sky is falling" mantra, "such an action should not, and

will not, impede Farmers' ability to investigate particular class member['s claims, and present evidence on individual claims supporting defenses unique to each claim and defend against the nature and extent of damages, if any, in this Court." CP 1581 (attached). On the other hand, "the only conceivable method to adjudicate or resolve this case is through a class action, as the de minimis size of individual claims would leave policyholders without practical recourse, absent class treatment, to address the contract construction (legal) and damages (fact) issues." CP 1579 (attached). This is no abuse of discretion.

Finally, Farmers mentions ***Sitton***, which is completely in accord with the trial and appellate courts' decisions in this case. That court ***affirmed*** the CR 23(b)(3) certification, largely on the same grounds in the case at bar. No conflict there.

But unlike here, that trial court then "granted plaintiffs' motion to bifurcate the trial and adopted a plan for two trial phases," the first to determine "whether State Farm implemented a program designated to deny, limit, or terminate [insureds'] PIP claims," whether this was in bad faith, and "aggregate damages." 116 Wn. App. at 250. The second "inchoate" phase would "address issues of individual damages." *Id.*

Plainly, that adopted trial plan violated due process because it deprived the defendants of their right to present *any* liability defenses and relieved the plaintiffs of *any* duty to prove causation. 116 Wn. App. at 258-60. But the trial court in this case has not adopted *any* trial plan, and has unequivocally stated that *no* trial plan "should" or "will" deprive Farmers of its defenses or alleviate the plaintiffs' burden to established liability, causation or damages. Of course, now that the appellate court has determined that Farmers' policies cover diminished value as a matter of law, if the plaintiffs can establish diminished value, then Farmers has breached its duty to its insureds as a matter of law – it admits that it never compensated the class members for diminished value.

This case is simply not in the same procedural posture as ***Sitton***, and never will be. There is no conflict, and no abuse of discretion. The Court should promptly deny discretionary review.

CONCLUSION

For the reasons stated above and in the accompanying motion to expedite, this Court should promptly deny review.

RESPECTFULLY SUBMITTED this 6th day of May, 2010.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 6th day of May 2010, to the following counsel of record at the following addresses:

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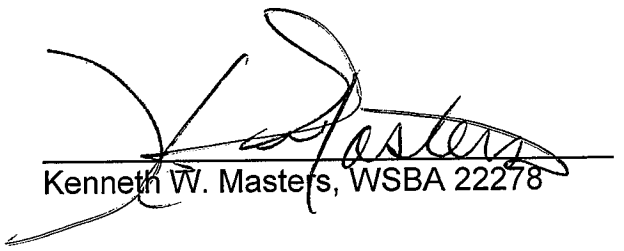

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